FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 9 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 441.

GENERAL TRADING COMPANY, a corporation, doing business as MINNEAPOLIS IRON STORE,
Petitioner,

vs.

STATE TAX COMMISSION OF THE STATE OF IOWA,
Respondent.

BRIEF IN BEHALF OF THE STATE TAX COMMISSION OF THE STATE OF IOWA, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN M. RANKIN, Attorney General of the State of Iowa,
JENS GROTHE, Special Assistant Attorney General of the State of Iowa,
Attorneys for State Tax Commission of the State of Iowa, Respondent.

INDEX.

	Page
Statement of the Case	1
Argument	4
Conclusion	12

TABLE OF CASES AND AUTHORITIES.

State Decisions:

W. J. Sandberg v. Iowa State Bd. of Assessment & Review, 225 Iowa 103; 278 N. W. 643.

Jones v. Dunkelberg, 221 Iowa 1031; 265 N. W. 157.

State v. Talerico, 227 Iowa 1315; 290 N. W. 660.

Witmer v. Polk County, 222 Iowa 1075; 270 N. W. 323.

State v. Woitha, 227 Iowa 1; 287 N. W. 99; 123 A. L. R. 884.

State v. Phillips Petroleum Co., ___ Iowa ___; 271 N. W. 192.

State v. Standard Oil Co., 222 Iowa 1209; 271 N. W. 185.

State Tax Commission v. General Trading Co., 10 W. (2nd) 659 (Case at bar, decided July 27, 1943.)

Federal Decisions:

Bowman v. Continental Oil Co., 256 U. S. 642; 65 L. Ed. 1139 4

Monamotor Oil Co. v. Johnson, 292 U. S. 86; 78 L. Ed. 1141 4

Henneford v. Silas Mason Co., 300 U. S. 577; 81 L. Ed. 814 5

Nelson v. Montgomery Ward & Co., 85 L. Ed. 897; 312 U. S. 373.

Nelson v. Sears Roebuck & Co., 312 U. S. 359; 85 L. Ed. 888.

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62; 83 L. Ed. 488 6

Page

TABLE OF CASES AND AUTHORITIES.

Federal Decisions:

Felt & Tarrant Mfg. Co. v. Corbett, 23 Fed. Sup. 186.

1st Nat. Bank v. Kentucky, 9 Wall. 353; 19 L. Ed. 701.

1st Nat. Bank v. Chehalis County, 166 U. S. 440; 41 L. Ed. 1069; 17 S. Ct. 629.

Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461; 42 L. Ed. 236; 17 S. Ct. 829.

Home Sav. Bank v. Des Moines, 205 U. S. 503; 51 L. Ed. 901; 27 S. Ct. 571.

Pierce Oil Corp. v. Hopkins County, 264 U. S. 137; 68 L. Ed. 593; 44 S. Ct. 251.

International Harvester Co. v. Kentucky, 234 U. S. 579, 585; 58 L. Ed. 1479; 34 S. Ct. 944.

Natural Gas Pipeline Co. v. Slattery, 302 U. S. 300; 82 L. Ed. 276; 58 S. Ct. 199.

TABLE OF STATUTES.

Sec. 6943.102—6943.106, Iowa Code of 1939.

Sec. 6943.109, Iowa Code of 1939.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 441.

GENERAL TRADING COMPANY, a corporation, doing business as MINNEAPOLIS IRON STORE,
Petitioner,

vs.

STATE TAX COMMISSION OF THE STATE OF IOWA,
Respondent.

BRIEF IN BEHALF OF THE STATE TAX COMMISSION OF THE STATE OF IOWA, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The following allegations of plaintiff's petition were expressly admitted by defendant's answer:

"1. That the plaintiff is a branch of the government of the State of Iowa and is charged with the power and duty to collect the use tax due the State of Iowa under Chapter 329.4 of the 1939 Code of Iowa.

2. That the defendant General Trading Company is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business in Saint Paul, Minnesota, and said defendant is engaged in the sale of certain merchandise through its branch under the trade name of Minneapolis Iron Store located in Minneapolis, Minnesota.

* * * * * * * *

5. Plaintiff states that defendant failed to file use tax returns for said period and failed to collect and pay to the State of Iowa the use tax due the State of Iowa for sales and deliveries of merchandise during said period under the provisions of Section 6943.113 of the 1939 Code of Iowa and thereafter on October 6, 1941, the plaintiff Commission, acting pursuant to the provisions of Section 6943.116 of the 1939 Code of Iowa, determined the amount due the State of Iowa for such sales and deliveries of merchandise during said period in the sum of $360.00 with penalty computed to October 6, 1941, in the sum of $102.96, or a total of $462.96 and there is attached hereto marked Exhibit 'A' and by reference made a part hereof a copy of said assessment. Notice of said assessment was given to the defendant by registered mail addressed to the defendant at its place of business in Minneapolis, Minnesota, a copy of which notice is attached hereto, marked Exhibit 'B' and by reference made a part hereof. The return receipt of the registered envelope containing the notice of assessment bears date October 7, 1941, and there is attached hereto marked Exhibit 'B-1' the return receipt of said registered envelope which is by reference made a part hereof.

6. Plaintiff states that no appeal was taken from said determination of tax and the time for appeal has expired."

The following well pleaded allegations of defendant's answer were admitted by plaintiff's demurrer thereto:

"That defendant is a corporation duly organized and existing under the laws of the State of Minnesota with its principal place of business in Saint Paul in that state; that it has never qualified to do business in the State of Iowa as a foreign corporation or otherwise under the Iowa statutes. That it has not maintained any office, distribution house, sales house or warehouse through which it has sold tangible personal property to persons in Iowa; that from time to time defendant sent from the State of Minnesota into the State of Iowa travelling salesmen, none of whom ever lived or had headquarters in the State of Iowa; that said travelling salesmen went into the State of Iowa and solicited orders for merchandise which were subject to acceptance or rejection by defendant at its

office in Minneapolis, Minnesota; that in filling such orders as were accepted by the defendant at its office in Minneapolis, Minnesota, goods and merchandise were shipped from the place of business of defendant in Minneapolis, Minnesota, by delivery to common carriers, either by truck or rail or by delivery to the United States Postal Department for transportation to such purchasers in the State of Iowa; that such purchasers paid all cost of such transportation by such common carriers or by parcel post."

Simultaneously with the filing of the answer, the Tax Commission filed a demurrer thereto which asserted:

1. The answer shows on its face that the defendant is a "retailer" and a "retailer maintaining a place of business in this state" as defined by paragraphs 5 and 6 of Section 6943.102, Code of 1939.

2. The answer shows on its face that defendant as a "retailer" and a "retailer maintaining a place of business in this state" made sales to Iowa purchasers and is liable for said use tax assessment under the provisions of the Iowa Use Tax Law.

The demurrer was sustained by the trial court and this decision was upheld by the Iowa Supreme Court (*State Tax Commission of the State of Iowa vs. General Trading Company, supra*).

That the following allegations of defendant's answer were purely argumentative and conclusions of law, and were therefore not admitted by the demurrer:

"That its right to engage in such business was not dependent on any law of or privilege extended by the State of Iowa and was not subject to regulation by the State of Iowa; that the right to engage in such business is a right conferred upon defendant by virtue of the Constitution and laws of the United States and by the laws of Minnesota; that as applied to the transactions of the defendant hereinbefore set forth, plaintiff and the State of Iowa were, and are, wholly without jurisdiction to make any assessment against or charge upon this defend-

ant for the privilege of carrying on such interstate business, and that if Chapter 329.4, Iowa Code of 1939, commonly known as the Iowa Use Tax Act, be construed to give the plaintiff power to make an assessment against the defendant, the said Act is void for the reason that said law violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and further violates the provisions of Section 8, Article I, of the Constitution of the United States, which vests in the Congress of the United States exclusive power to regulate commerce with foreign nations and among the several states; that if so construed, said statute would result in the taking of property of this defendant without due process of law, contrary to and in violation of the provisions of Section 9, Article I, of the Constitution of the State of Iowa."

ARGUMENT.

It is our contention that the petition for writ of certiorari herein should be denied for the reason that the case at bar is ruled by the following cases decided by this Court:

Bowman v. *Continental Oil Co., Supra.*
Monamotor Oil Co. v. *Johnson, Supra.*
Henneford v. *Silas Mason Co., Supra.*
Felt & Tarrant Mfg. Co. v. *Gallagher, Supra.*
Nelson v. *Sears Roebuck & Co., Supra.*
Nelson v. *Montgomery Ward & Co., Supra.*

Bowman v. *Continental Oil Co.* recognized the right of the state to require a distributor "to render detailed statements of all gasoline received, sold, or used by it, *whether in interstate commerce or not*, to the end that the State may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated." (Italics ours.)

Monamotor Oil Co. v. *Johnson* upheld an Iowa statute. The complainant there sought an injunction prohibiting tax officers from requiring the distributor of motor oil received

from another state to pay into the state treasury the tax levied upon the consumer.

This Court in holding the Oil Company's contention untenable said:

> "There is no substance in the claim that the statutes impose a burden upon interstate commerce, * * * The statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement. * * * The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, *report and pay* the tax on the gasoline thus coming into the state for use by others on whom the tax falls *imposes no unconstitutional burden either upon interstate commerce or upon the appellant.*" (Italics ours.)

Henneford v. *Silas Mason Co.* upheld a Washington statute similar to the one under consideration. The opinion declared:

> "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.
>
> "Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination * * *. This is so, indeed, though they are still in the original packages * * *. For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or enjoyment * * *. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

The requirement that the retailer act as agent of the state in collecting the tax from its customers is not an attempt on the part of the state to impose its laws extra-territorially.

Henneford v. *Silas Mason Co.*, 300 U. S. 577; 81 L. Ed. 814.
Monamotor Oil Co. v. *Johnson*, 292 U. S. 86; 78 L. Ed. 1141.
Felt & Tarrant v. *Gallagher*, 306 U. S. 62; 83 L. Ed. 488.

The use tax is conditioned upon an event occurring within the state of Iowa, namely, use, and it is immaterial if the order was the result of personal solicitation, or the approval of the order an extra-state activity.

McGoldrick v. *Berwind-White Coal Min. Co.*, 309 U. S. 33; 84 L. Ed. 565; 60 S. Ct. 388; 128 A. L. R. 876.
Jagels v. *Taylor*, 309 U. S. 619; 84 L. Ed. 983; 60 S. Ct. 469.

The collection and payment provisions of the Iowa Use Tax Act as applied to petitioner imposes no unconstitutional burden on interstate commerce.

McCarroll v. *Dixie Greyhound Lines*, 309 U. S. 176; 84 L. Ed. 683.
Wiloil Corp. v. *Pennsylvania*, 294 U. S. 168; 79 L. Ed. 838.
Hollis & Co. v. *McCarroll*, 200 Ark. 523; 140 S. W. (2d) 420.

The facts in *Felt & Tarrant Mfg. Co.* v. *Gallagher* are, in our opinion, similar to those in the case at bar. In parallel columns we set out the facts in each of these cases.

Felt & Tarrant Mfg. Co.	*General Trading Co.*
1. It was an Illinois corporation engaged in manufacturing and selling comptometers in that state and delivering these to pur-	1. It was a Minnesota corporation engaged in the business of dealing in wholesale iron and steel and automobile accessories which

chasers in various parts of the Union.

2. Carried on no intrastate operations in California.

3. Orders were taken by agents subject to acceptance or rejection by the home office in Illinois.

4. If order was accepted the machine was forwarded directly to the purchaser, or in order to secure reduced freight charges, large groups of machines were shipped to the general agent who made delivery to the respective purchasers. The only machines kept by plaintiff In California were those used as demonstrators.

5. Two general agents, each of whom was allotted a separate section of the state were engaged by Felt & Tarrant in the state of California. Under the employment contract the only compensation paid to the general agents consisted of commissions on sales made. Each general agent was given the privilege of employing sub-agents subject to the approval of plaintiff, also plaintiff agreed by the employment contract to pay the rent of an office for each

it sells among others to retailers in Iowa and also to persons living in Iowa who were not retailers, but bought them for their own use.

2. Carried on no intrastate operations in Iowa.

3. Agents took orders subject to acceptance or rejection by the home office in Minneapolis.

4. If the order was accepted by the home office in Minneapolis, the wholesale iron and steel and automobile accessories were shipped directly to the purchaser in Iowa by delivery to common carriers either by truck or rail or by delivery to the U. S. Postal Department for transportation to such purchasers.

5. Sent traveling salesmen, "from time to time during the period aforesaid", from the state of Minnesota into the state of Iowa, who solicited orders for said merchandise, which orders were expressly subject to acceptance or rejection by defendant at its office in Minneapolis.

general agent, provided the lease was first approved by it, such office to be used exclusively for furthering plaintiff's interstate business.

6. Plaintiff never qualified to do intrastate business in California.

7. Activities of plaintiff's agents were confined solely to promoting its interstate business. Said agents had no authority to represent plaintiff in any intrastate business activity. As a matter of fact had plaintiff carried on intrastate business it would have been in direct violation of the California law with reference to foreign corporations doing business in that state.

8. Plaintiff shipped no merchandise to California unless there was on file in its home office an approved order for same.

9. Plaintiff agreed to pay part of the traveling expenses incurred by each general agent, his sub-agents and demonstrators while traveling on business trips authorized by plaintiff and also to reimburse each general agent to the extent of part of the moneys advanced to a sub-agent and, in addition, in the amount of $40.00 per month toward the salary of a demonstrator.

6. Defendant never qualified to do intrastate business in Iowa.

7. Activities of defendant's agents were confined solely to promoting its interstate business. Said agents had no authority to represent defendant in any intrastate business activity. As a matter of fact had defendant carried on intrastate business it would have been in direct violation of the Iowa law with reference to foreign corporations doing business in this state.

8. Defendant shipped no merchandise to Iowa unless there was on file in its home office an approved order for same.

9. While it is not stated in any of the pleadings, it may be assumed, we believe, that defendant paid its traveling salesmen the expenses incurred by them while traveling on company business in this state. If such expenses were not paid as such, it may in any event be assumed that the salary or commissions paid were sufficiently large to cover these expenses.

10. The California statute defines "retailer" as including "every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by such person or others for storage, use or other consumption provided, however, that when in the opinion of the board, it is necessary for the efficient administration of this Act to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors, or employers as retailers for the purposes of this Act. The Act also requires every retailer maintaining a place of business in the state, and making sales of tangible personal property for storage, use or other consumption in the state not exempted under the law to collect the tax imposed by the Act from the purchaser.

10. The Iowa statute provides " 'retailer maintaining a place of business in this state' shall mean and include any retailer having or maintaining within this state * * * any agent operating within this state under the authority of the retailer whether such agent is located here permanently or temporarily * * *."

An attempt is being made by the petitioner to distinguish the case at bar from *Felt & Tarrant* v. *Gallagher*. We sincerely contend that the two cases cannot be distinguished. In both cases the agent's activities were confined solely to promoting their respective employers interstate business. The fact that the agents in the *Felt & Tarrant* case were living in California and had an office there, we think does not make the cases distinguishable, for in the latter case as in the case at bar, the agents sent out by the Minnesota and Illinois corporations could do nothing except take orders subject to acceptance or rejection by their employers at the home office. In both cases, if the order was accepted, the merchandise was shipped into the state in interstate commerce. Certainly the fact that the agents in the case at bar lived and worked in Iowa temporarily only, does not render the two cases distinguishable. We confidently assert that the *Felt & Tarrant* case is perfect authority for the position taken by us in the instant case.

We place equal reliance upon the cases of *Nelson* v. *Sears Roebuck & Co., Supra, Nelson* v. *Montgomery Ward & Co., Supra, Bowman* v. *Continental Oil Co., Supra, Monamotor Oil Co.* v. *Johnson, Supra, Henneford* v. *Silas Mason Co., Supra,* and other cases which, we believe, in principle, cannot be distinguished from the case at bar.

Under the heading "Reasons Relied on for the Allowance of the Writ" petitioner asserts that this Court should issue the writ because the decision below by the Supreme Court of Iowa is in direct conflict with the decision of the Supreme Court of Michigan in *Simpson* v. *Gundry*, 297 Mich. 403, 298 N. W. 81, certiorari denied, sub. nom. *Brown* v. *Simpson*, 314 U. S. 674. It is the claim of petitioner that the Michigan Supreme Court held its use tax invalid under the Federal Constitution as applied to the identical state of facts under which Iowa sustained its tax. We must respectfully assert that there is no merit in this contention. A casual reading

of the *Simpson* v. *Gundry* case will at once make it apparent that it is readily distinguishable from the case at bar. In the *Simpson* case it was held that the provisions of the statute expressly exempted plaintiff from the operation of the Michigan Use Tax Act under the peculiar facts of that case. The following quotation from the opinion will sustain our contention:

> "(1) A definition of words and phrases in an act carries no force unless employed in the enactment and cannot be considered in the present instance for the quoted enactment, by its specific terms, only applies to sellers of 'tangible personal property for storage, use or other consumption in this state, engaged in the business of selling at retail in this state', and this is manifested by the required registration of such persons under the act, unless registered under the sales tax act.
>
> (2) Plaintiff did not so register. * * *"

In other words, all that the *Simpson* case holds is that the Michigan Use Tax Act was not applicable to plaintiff for by its very terms it applied only to sellers of tangible personal property for storage, use or other consumption in the state engaged in the business of selling at retail. The term "seller" was defined to mean "the person from whom a purchase is made and includes every person engaged in this state or elsewhere in the business of selling tangible personal property for storage, use or other consumption in this state." The Act then goes on to provide:

> "Every seller of tangible personal property for storage, use, or consumption in this state engaged in the business of selling at retail in this state * * *."

It becomes apparent, therefore, that while the term "seller" was defined to include plaintiff, such definition had no force because it was not employed in the enactment itself and could not therefore be considered. In other words, the effect of the decision in the *Simpson* case is that as the Use

Tax Act was interpreted by the Michigan Supreme Court, the enactment did not apply to plaintiff under the facts revealed by the record. We maintain that upon the facts and the law, the *Simpson* case is clearly distinguishable from the case at bar. Certiorari was denied in the *Simpson* case and properly so, for your Honors were asked merely to decide whether the Michigan Supreme Court properly interpreted certain provisions of the Michigan Use Tax Act.

We are confident that it is superfluous to cite authorities to this Court on the proposition that the writ of certiorari will not be granted by this Court to review the correctness of a State Supreme Court's interpretation of state statutes.

CONCLUSION.

As this Court has held, the Iowa Use Tax is complementary to the Iowa Sales Tax. The former was enacted to remove the temptation of residents of Iowa to make purchases of merchandise under circumstances that would permit them to evade the payment of the Iowa sales tax. The use tax was enacted for the protection of Iowa retailers, many of whom, particularly those residing near the borders of the state were faced with ruinous competition by non-resident retailers. The use tax is a just and proper excise and petitioner in this case, we assert, does not come into any Court of Justice with very good grace when it asks to be permitted to compete with Iowa retailers on a 2% price differential. What the General Trading Company in effect says in the case at bar is this:

> "We have discovered a method of evading the Iowa use tax law and we want this Court to place its stamp of approval thereon."

Certainly respondent representing the people of Iowa has a right to ask this Court to protect it from those who are bent upon that which is clearly inimical to the retailers

of Iowa who conscientiously collect and pay sales tax on all goods sold by them. We are not asking petitioner to pay the use tax out of its own pocket. All we require is that upon business done in Iowa, it collect from its customers and remit to the Tax Commission such use taxes. Certainly this is a just and fair requirement. There is no reason why a foreign retailer should ask to come into Iowa and operate upon any basis except one of equality with Iowa retailers. We are confident that this Court will see the justice of our position and will promptly hold that the contentions of petitioner are foreclosed by what this Court said and ruled in the many cases which we have herein cited and quoted from.

We therefore respectfully ask that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

JOHN M. RANKIN, Attorney General of Iowa,
JENS GROTHE, Special Assistant Attorney General of Iowa,
Attorneys for State of Iowa, Respondent.